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NO. ~~850~~

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

JESSE JAMES, STATE TREASURER OF TEXAS, ET AL.,

Appellants

v.

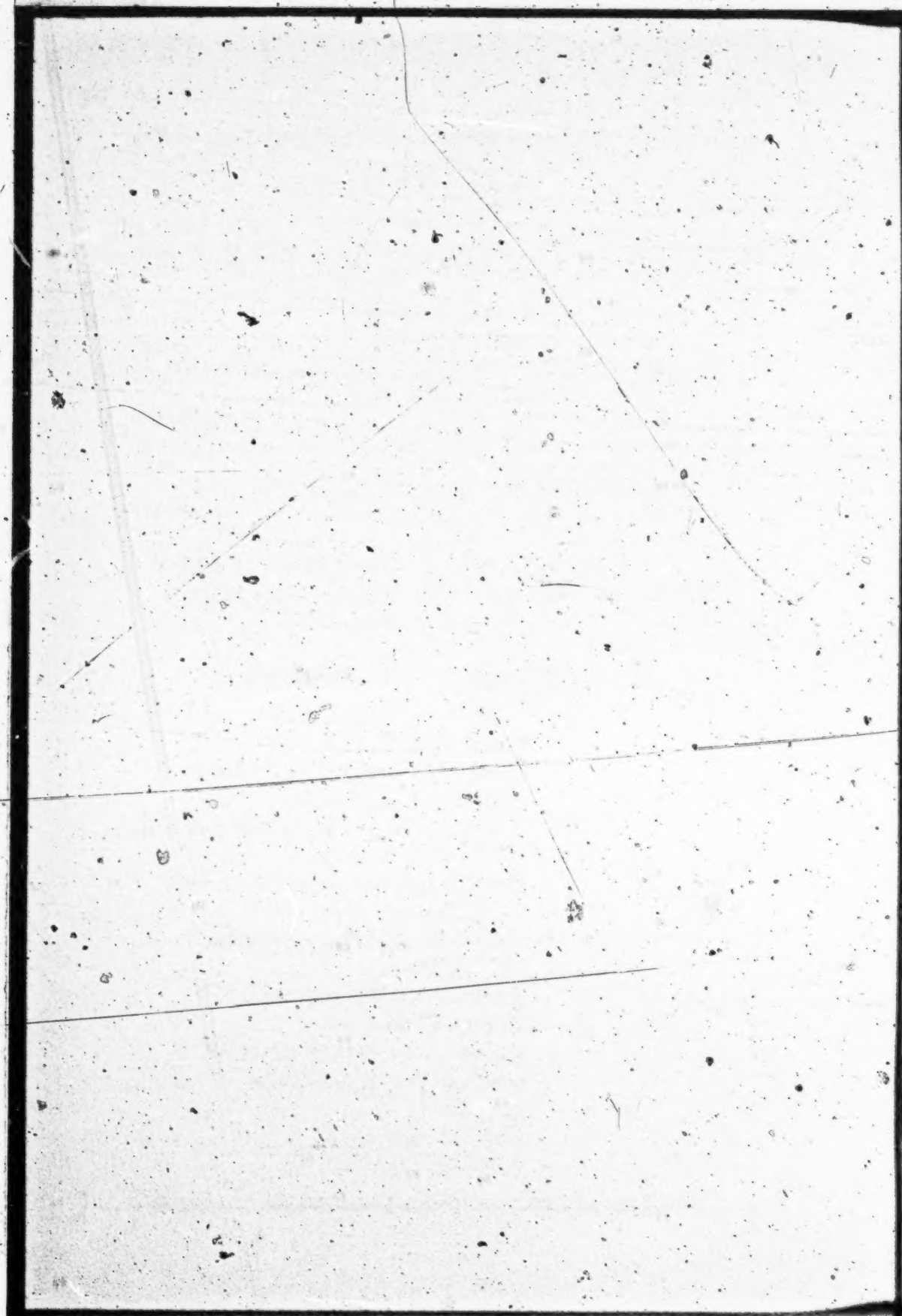
EVERETT M. GILMORE, JR., ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

JURISDICTIONAL STATEMENT

The appellants appeal from the judgment of the United States District Court for the Northern District of Texas, Dallas Division, entered on September 7, 1967, declaring Section 1 of Article 6252-7, Texas Civil Statutes (Vernon, 1954 Supplement), unconstitutional and permanently enjoining appellants from enforcing such statute. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, rendered on August 30, 1967, which is not yet reported, is attached hereto as Appendix A. The judgment of the court below is attached hereto as Appendix B.

JURISDICTION

This action was brought by the appellees in the United States District Court for the Northern District of Texas, Dallas Division, to enjoin the enforcement of Article 6252-7, Texas Civil Statutes (Vernon, 1954 Supplement), on the ground that such statute is unconstitutional. A three-judge court, convened pursuant to 28 U.S.C. § 2284, filed an opinion on August 30, 1967, holding Section 1 of Article 6252-7 unconstitutional; judgment decreeing Section 1 of Article 6252-7 to be unconstitutional and enjoining the appellants from enforcing said statute was entered on September 7, 1967; appellants' notice of appeal was filed in the District Court on October 2, 1967. The jurisdiction of the Supreme Court to review the decision of the court below by direct appeal is conferred by 28 U.S.C. § 1253 and 28 U.S.C. § 2101(b). *United States v. Georgia Pub. Serv. Comm.*, 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963); *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960); *Palmetto Fire Ins. Co. v. Conn*, 272 U.S. 295, 47 S.Ct. 88, 71 L.Ed. 243 (1926).

QUESTIONS PRESENTED

Section 1 of Article 6252-7, Texas Civil Statutes (Vernon, 1954 Supplement), prohibits the payment of

state funds to any person as salary or compensation for personal services unless and until such person executes an oath denying past or present membership in certain specified organizations.

1. Whether a person who is asked to execute the oath prescribed by Article 6252-7 as a condition to the payment of his salary or compensation may challenge the constitutionality of Article 6252-7 if his salary or compensation is not paid out of state funds?

2. Whether the action alleged by the appellee Gilmore is within the jurisdiction of a three-judge district court?

3. Whether venue for the action alleged against appellants James, Calvert, and Board of Regents was improper; and whether the refusal of the court below to either dismiss or transfer the cause against appellants James, Calvert, and Board of Regents to the district and division of their residence in accordance with 28 U.S.C. § 1406(a) deprived said appellants of rights secured to them by § 1391(b) of 28 U.S.C. and thereby rendered the judgment of the court below void?

4. Whether there is any evidence that the appellees Gilmore, Kahn, or Mantle have, by virtue of the requirements of Article 6252-7, been denied rights secured to them by the Constitution of the United States?

STATUTE INVOLVED

Section 1 of Article 6252-7, Texas Civil Statutes (Vernon, 1954 Supplement), provides as follows:

> "No funds of the State of Texas shall be paid to any person as salary or as other compensation for personal services unless and until such person

has filed with the payroll clerk, or other officer by whom such salary or compensation is certified for payment, an oath or affirmation stating:

"'1. That the affiant is not, and has never been, a member of the Communist Party. (The term "Communist Party" as used herein means any organization which (a) is substantially directed, dominated or controlled by the Union of Soviet Socialistic Republics, or its satellites, or which (b) seeks to overthrow the Government of the United States, or of any State, by force, violence or any other unlawful means); and

"'2. That the affiant is not, and, during the preceding five year period, has not been, a member of any organization, association, movement, group or combination which the Attorney General of the United States, acting pursuant to Executive Order No. 9835, March 21, 1947, 12 Federal Register 1935, has designated as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means; or, in the event that the affiant has during such five year period been a member of any such organization, association, movement, group or combination, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state that, at the time when he joined and throughout the period during which he was a member, he did not know that its purposes were the purposes which the Attorney General of the United States has designated; and

"'3. That the affiant is not, and, during the preceding five year period, has not been, a member of any "Communist Political Organization" or

"Communist Front Organization" registered under the Federal Internal Security Act of 1950 (50 U.S.C.A., sec. 781, et seq.) or required to so register under said Act by final order of the Federal Subversive Activities Control Board; or, in the event that the affiant has during such five year period been a member of any such organization, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state that, at the time when he joined it and throughout the period during which he was a member, he did not know that its purpose was to further the goals of the Communist Party or that it was controlled by the Communist Party.' "

STATEMENT

Everett M. Gilmore, Jr., was dismissed from his employment at the Dallas County Junior College when he refused to execute the oath set forth in Section 1 of Article 6252-7, Texas Civil Statutes (Vernon, 1954 Supplement). He then brought this action in the United States District Court; Northern District of Texas, Dallas Division, against the Junior College District, alleging that he was deprived of his First Amendment rights of freedom of speech, belief, conscience and association by the District's enforcement of Article 6252-7; he requested that Article 6252-7 be declared unconstitutional and its enforcement enjoined. A three-judge district court was convened pursuant to 28 U.S.C. § 2284. By successive amendments to the original complaint, Robert Palter, Stuart Pullen, and Thomas Mantle became plaintiffs in the action, each naming as defendants: Jesse James, State Treasurer of Texas; Robert S. Calvert, Comptroller of Public Accounts of Texas; and the Board of Regents of the University of Texas. Subsequently, Michael Kahn was allowed to in-

tervene as a party plaintiff against the last mentioned defendants. All alleged that the requirements of Section 1 of Article 6252-7 violated their First Amendment freedoms and asked that the statute be declared unconstitutional and its enforcement enjoined.

The appellee Gilmore did not allege a claim against the appellants James, Calvert, or Board of Regents of the University of Texas; Gilmore's complaint is directed solely to the acts of the Dallas County Junior College District in discontinuing his employment when he refused to execute the oath prescribed by Section 1 of Article 6252-7.

The appellees Palter and Pullen are members of the teaching staff of the University of Texas who executed the oath at the time of their employment. The appellee Mantle worked for a few hours as a student employee of the University of Texas, but his employment was discontinued because of his refusal to execute the statutory oath. The appellee Kahn was offered employment on the teaching staff of the University of Texas, but, because of Kahn's refusal to execute the prescribed oath, the contract of employment was not consumated. Palter, Pullen, Mantle and Kahn did not allege a claim against the Dallas County Junior College District; their complaint was directly solely against the appellants.

The appellants timely filed motions pursuant to Rule 12 of the Federal Rules of Procedure contending: (1) venue was improper as to appellants; (2) Gilmore's claim was not within the jurisdiction of a three-judge district court; (3) Gilmore had no standing to challenge the statute in question; (4) there was an improper joinder of parties. These motions were overruled by

the court below and appellants thereafter filed their Objection to Venue and Objection to Order Overruling Motions. The appellants then filed their answer to the complaint and therein denied that Article 6252-7 applied to Gilmore or the Dallas County Junior College District, or that any of the appellees had been deprived of rights secured to them by the Constitution of the United States.

The case was tried before the court below on August 3, 1967. The court held that venue was proper because the officers of the Dallas County Junior College are state officers who, in requiring Gilmore to execute the oath, were carrying out a state-wide policy; that Gilmore's claim arose out of the same transaction or series of transactions as the claims of Palter, Pullen, Mantle, and Kahn; and involved common questions of law or fact. With respect to the claims of Palter and Pullen, the court below found that they had failed to show that they had been injured by the enforcement of Article 6252-7 and therefore lacked standing to challenge the constitutionality of the statute in question. Gilmore, Kahn, and Mantle were held to have the necessary standing to assert the unconstitutionality of Article 6252-7 and the court condemned the statute and enjoined its enforcement; finding: *"To the extent that Article 6252-7 disqualifies passive or dissenting members of such organizations, it is too broadly drawn."*

THE QUESTIONS ARE SUBSTANTIAL

I. Jurisdiction and Venue.

Appellants consistently maintained throughout the proceedings in the court below that Article 6252-7 did not apply to Everett M. Gilmore, Jr.; that a three-

judge district court did not have jurisdiction of Gilmore's claim against the District; and that venue as to the appellants was improper.

The scope of application of Article 6252-7 is predicated upon the character of the funds which an employee is entitled to be paid. Although the court below correctly recognized that Article 6252-7 applies "only to those persons who receive state funds as a part or all of their salary," it erroneously concluded that Gilmore came within the scope of the statute and that the officials of the District were state officers carrying out a state-wide plan.

The character of the funds disbursed by the District is a question of state law. Although such funds may be characterized as public funds, if they are not state funds, Article 6252-7 does not apply to employees of the District.

The Dallas County Junior College District is a body corporate whose exclusive governing powers are vested in the Board of Trustees. Art. 2815h, Sec. 20, Tex. Civ. Stat. (Vernon, 1948). Even though the District is expressly authorized to levy and collect a tax upon property located within its boundaries, the tax funds are not funds of the State of Texas. *Shepherd v. San Jacinto Junior College,* 363 S.W.2d 742, 758 (Tex. 1962). During the period Gilmore was employed by the District, no money had been appropriated to the District by the state legislature, and even though the District did receive an appropriation from the state treasury on September 1, 1967, those funds, once received by the District, are not funds of the State of Texas. *Love v. City of Dallas,* 120 Tex. 351, 40 S.W.2d 20 (1931); cf. *Port Arthur Ind. Sch. Dist. v. City of Groves,* 376

S.W.2d 330 (Tex. 1964). Clearly, Gilmore was not within the class of persons to whom the statute applied; therefore, the District was neither authorized nor required to exact the oath of Gilmore. Nonetheless, the court below assumed jurisdiction of Gilmore's action: *"Whether Article 6252-7 applies to Gilmore as written is of no concern to us. We look only to the action of state officer's applying a state statute under 28 U.S.C.A. 2281. An allegation that the effect is violative of the Constitution confers jurisdiction upon a three-judge court."*

The fact that the District may have erroneously required Gilmore and other of its employees to comply with Article 6252-7 does not give Gilmore standing to challenge the constitutionality of the statute nor does whatever claim Gilmore may have against the District come within the jurisdiction of a three-judge district court. *Flax v. Potts,* 204 F.Supp. 458 (N.D. Tex. 1962) affirmed 313 F.2d 284 (5th Cir. 1963); *Sheldon v. Fannin,* 214 F.Supp. 940 (D. Ariz. 1962). See *Griffin v. School Bd. of Prince Edward,* 377 U.S. 218, 84 S.Ct. 1226; 12 L.Ed.2d 256 (1964); *Wilentz v. Sovereign Camp W.O.W.,* 306 U.S. 573, 59 S.Ct, 709, 83 L.Ed, 994 (1939); *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.,* 292 U.S. 386, 54 S.Ct. 732, 78 L.Ed. 1318 (1934); *Pleasant v. Missouri, Kan. & Tex. R.R. Co.,* 66 F.2d 842 (10th Cir. 1933); *Johnson v. Genessee County,* 232 F.Supp. 563 (D. Mich. 1964). The requirements necessary to invoke the jurisdiction of a three-judge district court are to be strictly construed. *Ex parte Collins,* 277 U.S. 565, 48 S.Ct. 585, 72 L.Ed. 990 (1928); *Bartlett & Co., Grain v. State Corp. Com'n of Kansas,* 223 F.Supp. 975 (D. Kan. 1963).

The officials of the District are not state officers. See *San Antonio Ind. Sch. Dist. v. State,* 173 S.W. 525 (Tex.Civ. App 1915, error ref.); 47 Tex.Jur.2d 23, Public Officers § 10; 38 Tex.Jur. 623, State of Texas § 18. Since the statute in question does not apply to employees of the District, this is not a case where local officials are required by statute to enforce a state-wide plan. The statute imposes no duty upon the District; its employees are not subject to the state-wide plan. Compare *Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89, 55 S.Ct. 678, 19 L.Ed. 1322 (1934) with *United States v. Mississippi,* 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965).

Although whatever claim Gilmore may have against the District for erroneously requiring Gilmore to comply with Article 6252-7 may properly be within the jurisdiction of a single-judge district court and venue for such claim may properly lie within the Northern District of Texas, Dallas Division; venue for the claim alleged against these appellants by the other appellees does not lie within that district. Rule 20, Federal Rules of Civil Procedure, does not authorize joinder where the effect would be to extend or limit jurisdiction of the district courts or the venue of actions. Rule 82, Fed. Rules Civ. Proc. Joinder of a claim as to which venue is improper with another claim properly laid does not cure the defective venue. *Locke Mfg. Co. v. Sabel,* (W. D.Ky. 1965) 9 F.R.Serv.2d 18a-43, case 1; *Bowles v. Edwards Mfg. Co.,* 57 F.Supp. 887 (S.D.N.Y. 1944); Barron and Holtzoff, *Federal Practice & Procedure,* Vol. 3A, § 1701, p. 172.

The Board of Regents of the University of Texas is a state board and its members are state officers. *Splawn*

v. Woodward, 287 S.W. 677 (Tex.Civ. App. 1926, no history). Jesse James and Robert S. Calvert are executive officers of the State of Texas. Const. of Tex., Art. IV, § 1, § 2. Their official residence for venue purposes is Austin, Travis County, Texas. *Fitts v. Calvert,* 374 S.W.2d 274 (Tex.Civ.App. 1963, error dism.); *Sheppard v. Zapp,* 120 S.W.2d 898 (Tex.Civ.App. 1938, no history); *University of Texas v. Booker,* 282 S.W. 2d 740 (Tex.Civ.App. 1955, no history); *Rainbo Baking Co. v. Aiken,* 362 S.W.2d 660 (Tex.Civ.App. 1962, no history); *Texas Highway Dept. v. Jarrell,* 379 S.W. 2d 417 (Tex.Civ.App. 1964, error dism.).

The claim which Gilmore alleges against the District is separate and distinct from the claim alleged against these appellants; joinder is not authorized by Rule 20, Federal Rules of Civil Procedure. The refusal of the court below to either dismiss or transfer the claim against these appellants in accordance with 28 United States Code § 1406(a) effectively deprived these appellants of the venue rights afforded them by 28 United States Code § 1391(b) and rendered the judgment of the court below void. *Chicago, R.I. & Pac. R.R. v. Igoe,* 212 F.2d 378 (7th Cir. 1954).

II. Appellees Show No Denial of Constitutional Rights.

The court below correctly held that the oath required by Article 6252-7 binds the maker to nothing but the existence of present and past facts; i.e., membership in the indicated organizations: *"It does not bind him to avoid future associations or abstain from future conduct of any kind. We consider it to impose no prospective restraints of any character on plaintiffs' conduct."*

It is elementary that one who challenges the constitutionality of a statute must show that the statute prejudicially affects their personal rights. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940); *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L. Ed. 1078 (1923). The appellees failed to meet this burden of proof.

a. Palter & Pullen

Robert Palter and Stuart Pullen both executed the oath prescribed by Article 6252-7 at the time they were employed by the University of Texas. They each testified that they had not been members and were not presently members of any organization specified by Article 6252-7; each testified that he presently had no desire to belong to any of such organizations; each testified that the statute in question had not prevented him from writing, speaking, thinking, teaching, associating or acting as he might choose. Based upon this evidence, the court below correctly held that:

> ". . . these two plaintiffs have failed to show that they have been injured by an enforcement of Article 6252-7. There must be some probability of invaded rights before injunctive muscles are to be flexed . . . [they] have wholly failed to establish the necessary standing to attack the constitutionality of Article 6252-7."

b. Gilmore & Kahn

Everett M. Gilmore, Jr., did not testify, either in person or by deposition. The record is silent as to his

past or present membership in any organization specified by Article 6252-7 or as to how he has been restricted in thought, deed, or action.

Michael Kahn testified that he was not presently a member and had not in the past been a member of any organization proscribed by Article 6252-7. He further testified that he did not presently wish to become a member of any such organization and that the statute would impose no restriction upon his writing, speaking, thinking, teaching, or associating as he might choose. He stated that he felt that the requirement of the oath was personally demeaning.

Based upon the evidence in the record Gilmore and Kahn have, like Palter and Pullen, failed to show that the statute in question has affected a right which is personal to them. The only thing which has been denied to them is public employment. No one has an abstract right to public employment. Cf. *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952). Neither Gilmore or Kahn have shown that they have violated the prohibition of the statute; their attack goes to nothing more than the political expediency of Article 6252-7 and does not present constitutional issues. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). They have been asked to sign an oath which imposes no restraint upon their constitutional rights.

c. Mantle

Thomas Mantle testified that he joined the Industrial Workers of the World knowing that it had been designated a subversive organization by the Attorney General of the United States; that he actively participated

in the organization with full knowledge of the purposes and goals of the organization. He further testified that he was not presently a member of the Communist Party and had never been a member of that party. A state is not required to employ those persons who are shown to be active members of a subversive organization with knowledge of the purposes of the organization. *Garner v. Board of Public Works,* 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951); *Lerner v. Casey,* 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423 (1958). No constitutional right has been denied to Thomas Mantle. *American Communications Asso. v. Douds,* 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950); *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

III. Article 6252-7 Is Not Unconstitutional.

The court below held that Section 1 of Article 6252-7 was unconstitutional because it "*suffers from the same 'impermissible overbreadth' which afflicted the statutory provisions struck down in* Elfbrandt *and* Keyishian."

When reduced to its essential terms, Article 6252-7 provides that no state funds are to be paid for employment of any person unless he first executes an oath or affirmation that:

1. He is not and has never been a member of the Communist Party;

2. He is not, and during the past five years has not been, a member of an organization listed by the Attorney General of the United States pursuant to Executive Order No. 9835, March 21, 1947, 12 Federal Reg-

ister 1935 *or,* if he was a member during such period, he may explain that he did not have knowledge of the proscribed purposes of the organization at the time he joined or during the period he was a member;

3. He is not, and during the past five years has not been, a member of any organization registered under the Federal Internal Security Act of 1950 *or,* if he was a member during such period that he did not have knowledge of the proscribed purposes of the organization at the time he joined or during the period he was a member.

Article 6252-7 does not prohibit a state employee from speaking, believing in, advocating, teaching, writing, or actively attempting the overthrow of the Government of the United States or of any state by force, violence or any other unlawful means. Without running afoul of Article 6252-7, he may do, say, think, write, teach, discuss, advocate whatever he may desire and associate with whomever he may choose as long as he is not a member of the proscribed organizations.

Article 6252-7 makes no arbitrary classification of the innocent with the guilty. Innocent membership may be explained in all but the Communist Party. It is absurd to say that one may be an innocent member of the Communist Party. The goals, aims, and purposes of the Communist Party and the requirement that its members be militant, active supporters and advocates of those purposes are well known and have been judicially recognized by this Court. *American Communications Asso. v. Douds,* 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950); *Dennis v. United States,* 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951); *Communist*

Party of U.S.A. v. Subversive Activities Control Board, 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961).

The statutes under consideration in *Elfbrandt v. Russell*, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966) and *Keyishian v. University of N.Y.*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) did not allow for an explanation of innocent membership in the proscribed organizations. Indeed, it is implicit in those decisions, as well as the decisions in the cases relied upon therein, that a statute which provided for an opportunity to explain innocent membership in a proscribed organization would not be impermissibly overbroad.

Appellants submit that none of the loyalty oath statutes which have heretofore come before this Court have allowed for innocent membership nor have they so narrowly defined the proscribed activity. Article 6252-7 suffers from none of the constitutional infirmaties which this Court has heretofore found in state loyalty oath statutes.

States may make inquiry into past and present organizational membership to ascertain whether persons seeking public employment are unreliable, untrustworthy, or disloyal. *Garner v. Board of Public Works*, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951); *Lerner v. Casey*, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423 (1958); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

Article 6252-7 is sustainable under the principles announced by this Court in: *American Communications*

Asso. v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950); *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *Garner v. Board of Public Works,* 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 745 (1951); *Lerner v. Casey,* 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423 (1958); *Gerende v. Board of Supervisors of Elections,* 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745 (1951). The statute may be condemned only if it has been clearly shown that it conflicts with the constitution. *Alabama State Federation of Labor v. McAdroy,* 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945); *American Communications Asso. v. Douds,* 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950); *Thompson v. Consolidated Gas Utilities Corp.,* 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510 (1937). It has not been shown that the personal rights of any of the appellees have been impaired by Article 6252-7. *Massachusetts v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1952); *United Public Workers v. Mitchell, supra.*

CONCLUSION

It is submitted that the questions presented by this appeal are substantial and of public importance, requiring plenary consideration by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. O. Shultz II, one of the attorneys for the appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the

---day of November, 1967, I served a copy of the foregoing Jurisdictional Statement on the appellees by depositing a copy in the United States Mail as certified mail with postage prepaid and addressed to the attorney of record for said appellees as follows: David R. Richards, 1601 National Bankers Life Building, Dallas, Texas, 75201.

W. O. SHULTZ II
Assistant Attorney General
of Texas

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-1777

EVERETT M. GILMORE, JR., ET AL.
Plaintiffs

v.

JESSE JAMES, Treasurer of the STATE OF TEXAS, ET AL.
Defendants

OPINION

Before GOLDBERG, Circuit Judge, HUGHES and TAYLOR, District Judges. GOLDBERG, Circuit Judge, and TAYLOR, District Judge.

Everett M. Gilmore, Jr., was a tuba instructor at Dallas County Junior College when that newly created institution first began its academic curriculum in September, 1966. Upon his refusal to execute the non-subversive loyalty oath required of all instructors at the college,[1] Gilmore was dismissed.

He thereafter commenced against the trustees of the

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[1] State of Texas
County of Dallas
I, ..., the affiant herein, do solemnly swear (or affirm) as follows:
That the affiant is not, and has never been, a member of the

college this action for a declaratory judgment and in-

Communist Party. (The term "Communist Party" as used herein means any organization which (a) is substantially directed, dominated or controlled by the Union of the Soviet Socialistic Republics, or its satellites, or which (b) seeks to overthrow the Government of the United States, or of any State, by force, violence or any other unlawful means) and

That the affiant is not, and, during the preceding five year period, has not been a member of any organization, association, movement, group, or combination which the Attorney General of the United States, acting pursuant to Executive Order No. 9835, March 21, 1947, 12 Federal Register 1935, has designated as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means; or in the event that the affiant has during such five year period been a member of any such organization, association, movement, group or combination, its name and the circumstances in detail which led him to join it are as follows:

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and at the time when he joined and throughout the period during which he was a member, he did not know that its purposes were the purposes which the Attorney General of the United States has designated; and

That the affiant is not, and, during the preceding five year period, has not been, a member of any "Communist Political Organization" or "Communist Front Organization" registered under the Federal Internal Security Act of 1950 (50 U. S. C. A., Sec. 781, et seq.) or required to so register under said Act by final order of the Federal Subversive Activities Control Board; or, in the event that the affiant has during such five year period been a member of any such organization, its name and the circumstances in detail which led him to join it are as follows:

---

and at the time when he joined it and throughout the period during which he was a member, he did not know that its purpose was to further the goals of the Communist Party or that it was controlled by the Communist Party.

.....

Affiant

Subscribed and sworn to before me this.....day of.....,

junctive relief,[1] alleging that he was deprived of his First Amendment rights of freedom of speech, belief, conscience and association by the enforcement by the college trustees of Article 6252-7, Texas Revised Civil Statutes,[2] allegedly an unconstitutionally vague statute.

19....., to certify which, witness my hand and official seal of office.

.....
Notary Public, Dallas County, Texas

[1]Plaintiff seeks injunctive relief, pursuant to Title 28 U.S.C.A., § 2281.

§ 2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

[2]Section 1. No funds of the State of Texas shall be paid to any person as salary or as other compensation for personal services unless and until such person has filed with the payroll clerk, or other officer by whom such salary or compensation is certified for payment, an oath or affirmation stating:

"1. That the affiant is not, and has never been, a member of the Communist Party. (The term 'Communist Party' as used herein means any organization which (a) is substantially directed, dominated or controlled by the Union of Soviet Socialistic Republics, or its satellites, or which (b) seeks to overthrow the Government of the United States, or of any State, by force, violence or any other unlawful means); and

"2. That the affiant is not, and, during the preceding five year priod, has not been, a member of any organization, association, movement, group or combination which the Attorney General of the United States, acting pursuant to Executive Order No. 9835, March 21, 1947, 12 Federal Register 1935,' (footnote omitted) has designated as totalitarian, fascist, communist or subversive, or as having adopted a

In plaintiff Gilmore's first amended complaint he is joined by Cameron Cunningham, a second year law

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policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means; or, in the event that the affiant has during such five year period been a member of any such organization, association, movement, group or combination, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state that, at the time when he joined and throughout the period during which he was a member, he did not know that its purposes were the purposes which the Attorney General of the United States has designated; and

"3. That the affiant is not, and, during the preceding five year period, has not been, a member of any 'Communist Political Organization' or 'Communist Front Organization' registered under the Federal Internal Security Act of 1950 (50 U.S.C.A., sec. 781, et seq.) or required to so register under said Act by final order of the Federal Subversive Activities Control Board; or, in the event that the affiant has during such five year period been a member of any such organization, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state that, at the time when he joined it and throughout the period during which he was a member, he did not know that its purpose was to further the goals of the Communist Party or that it was controlled by the Communist Party."

Section 2. The Department of Public Safety shall obtain a list of the organizations, associations, movements, groups and combinations comprehended by Subdivisions 2 and 3 of Section 1 hereof, and shall furnish a copy of such list to the various agencies which expend funds of this State. Such agencies shall make copies of such list and shall furnish them to their employees in order that the employees can readily perceive whether they can lawfully and truthfully file the oath or affirmation required herein.

Section 3. * * *

Section 4. It is specifically provided, however, that the oath required herein shall supersede all other loyalty oaths now required by law or that may be required in appropriation Acts by the Legislature.

Section 5. If any portion of this Act should be held to be unconstitutional, the unconstitutionality of such portion shall not affect the validity or application of the remainder of the Act. Acts 1958, 53rd Leg., p. 51, ch. 41.

student at the University of Texas School of Law in Austin, Texas. As a student in a state supported institution of higher learning, Cunningham has been required to comply with the provisions of Article 2908b, Texas Revised Civil Statutes, by executing a loyalty oath similar to the one required of Gilmore. Cunningham seeks to enjoin the Board of Regents of the University of Texas from enforcing the provisions of the Texas statute requiring the student oath.

By plaintiff's second amended complaint, Robert Palter, Stuart Pullen and Thomas Mantle join the aforementioned duo. Palter is a full professor of philosophy at the University of Texas and has been so employed since September, 1964. Pullen has been an assistant instructor in government at the University of Texas since September, 1965. As a condition of their initial employment, Palter and Pullen were required to execute the oath prescribed by Article 6252-7. They attack that statute on two grounds: first, as a consequence of their signing the oath, unconstitutional restrictions upon their rights of freedom of speech and association have resulted; they are required to conform to a standard of conduct which is not susceptible of accurate determination; and they may not repudiate the oath without facing loss of status and salary. Secondly, the oath was unconstitutionally applied to them and is now and will in the future be so applied to all members of the class which they allegedly represent, to-wit, prospective employees of the University of Texas. They seek to enjoin the Regents of the University of Texas from requiring continued compliance with the provisions of Article 6252-7 and to enjoin the requirement of such oath-taking by such members of their class.

Mantle is a student at the University of Texas. On March 22, 1967, he began employment in the library of the School of Law at Texas University. Subsequent to commencing his duties at the library, Mantle was informed by the personnel office of the university that as a condition of his employment it was necessary that he execute a loyalty oath prescribed by Article 6252-7.[1]

Mantle was given a list of organizations designated by the Attorney General of the United States as totalitarian, fascist, communist or subversive,[2] asked

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[1] "I, ..., the affiant herein, do solemnly swear (or affirm) as follows:

1. That the affiant is not, and has never been, a member of the Communist Party. (The term "Communist Party" as used herein means any organization which (a) is substantially directed, dominated or controlled by the Union of Soviet Socialistic Republics, or its satellites, or which (b) seeks to overthrow the Government of the United States, or of any State, by force, violence or any other unlawful means); and

2. That the affiant is not, and, during the preceding five year period, has not been, a member of any organization, association, movement, group, or combination which the Attorney General of the United States, acting pursuant to Executive Order No. 9835, March 21, 1947, 12 Federal Register 1935, has designated as totalitarian, fascist, communist or subversive or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means; and

3. That affiant is not, and, during the preceding five year period, has not been, a member of any "Communist Political Organization" or "Communist Front Organization" registered under the Federal Internal Security Act of 1950 (50 U.S.C.A., sec. 781, et seq.) or required to so register under said Act by final order of the Federal Subversive Activities Controls Board.

.....
Affiant

[2] See, Executive Order No. 10450 and first, second, third and fourth supplements thereto, December 9, 1953.

to read the list and sign the oath. Upon discovering that an organization of which he was a member appeared on the list, Mantle was compelled to decline to execute the oath and was thereupon dismissed from employment by the university.

By motion to intervene, Michael Kahn became a party plaintiff. Kahn was an assistant professor of psychology at Yale University in New Haven, Connecticut. Consummating a period of negotiations Kahn was offered, on April 5, 1967, the position of associate professor of psychology at the University of Texas. He seeks to enjoin the regents of that university from requiring of him the Article 6252-7 oath, which has been made a condition of his employment, for the reason that his constitutional rights of freedom of speech and association are threatened to be impaired by the oath requirement.

Jurisdiction of all parties plaintiff is predicated on 42 U.S.C.A. 1983, 1984 and 28 U.S.C.A. 1331, 1343, 2201, 2202, 2281 and 2284.

By their pleadings and by their oral arguments defendants Dallas Junior College and the University of Texas raise a number of issues peculiar to each of the respective plaintiffs which must be disposed of before a consideration of the substantive nature of the oath is undertaken. We turn to these issues.

(a) Gilmore

Dallas County Junior College, hereinafter referred to as El Centro, was created by popular vote of the residents of Dallas County, Texas, in May, 1965, in accordance with the provisions of Article 2815h, Tex-

*The Industrial Workers of the World.

as Revised Civil Statutes.' Under the provisions of Article 2815k, Texas Revised Civil Statutes, the newly elected Board of Trustees began to organize academic departments. A music department was established, and the director thereof was commissioned to solicit the employment of qualified musicians to instruct students in the playing of various musical instruments. A list of 25 such individuals was submitted by the director to the trustees, all of whom were approved. Gilmore was on this list.

El Centro's employment of any one of the individuals on the list of qualified musicians was contingent upon a student registering for instruction on the respective instrument to be taught by that individual. One student registered for instruction on the tuba for the fall semester, September, 1966, to January, 1967, and Gilmore's services were engaged.

No written contract was consummated by Gilmore and El Centro; their agreement was wholly oral. Gilmore was to be paid $150 a semester in quarterly installments of $37.50 each.

Gilmore began his teaching assignment in September, 1966. Apparently through inadvertence on the part of El Centro, he was not asked to execute the loyalty oath at that time. On October 15, 1966, when it was brought to Gilmore's attention that submission to the requirements of the oath was a condition of employment at El Centro, he declined to execute the same in a letter to the Director of Music. By letter of October 18, 1966, the Associate Dean of Instruction informed Gilmore that the college had "no choice but to accept [his] refusal and to seek another teach-

'Tex. Rev. Civ. Stat., Art. 2815h, sec. 20.

er." Two days thereafter Gilmore was sent a check by the college in the amount of $37.50, representing that portion of the agreed remuneration he had earned. Gilmore returned the check in a letter-appeal to the Board of Trustees in which he stated in part, "The termination of my employment by the college deprives me of constitutional protections and I request prompt reinstatement." By reply letter the President of El Centro informed Gilmore that,

> "Your employment was part-time on the approved list of musician teachers or instructors, however, with the understanding that you would be called if and when your services were desired.
>
> Since you refused to sign the loyalty oath which the Attorney General has advised that our District must comply with, the District has no alternative but not to call on you for further service."[4]

In his reply to plaintiff's complaints the Attorney General of Texas, representing defendant Texas University, avers that Article 6252-7 did not apply to El Centro for the reason that the college had not at the time of Gilmore's dismissal received funds appropriated by the Texas Legislature. Presumably, in reliance on this pleading, and subsequent thereto, El Centro admitted that it had erroneously applied Article 6252-7 to Gilmore and tendered into the registry of the Court $150, representing the full salary Gilmore was to receive for the semester for which he had been retained to render his services.

El Centro defends against Gilmore's claims on three procedural grounds: (1) the oath, which under the terms of the statute did not apply to Gilmore, was

[4] See n. 2, supra.

erroneously required of him by the college and therefore he has no standing to attack the *statute* in a three-judge court, but must resort to a state court and seek damages; (2) any claim Gilmore had against the college is moot because he had no right to public employment; his services were wholly contingent upon a student's registering for tuba instruction, and the tender to the court of Gilmore's one semester's salary of $150 rectifies any harm done to him; and (3) Gilmore failed to exhaust his state remedies before entering federal court.

(1) Standing in a Three-Judge Court

Article 6252-7 is explicit in applying only to those individuals who receive state funds as part or all of their salary. Plaintiff Gilmore admits that El Centro was not in receipt of state funds to disburse to its instructors at the time he was dismissed. He nonetheless argues that the application to him of the statutory oath by the trustees of El Centro is sufficient to confer standing upon him to seek an injunction against the enforcement of Article 6252-7. Defendants cite to the court numerous authorities in support of the position that this court is without authority to interpret or construe the meaning of a state statute and urge us to refrain from undertaking to decide the queston of Gilmore's amenability to Article 6252-7. Readily admitting that they erroneously applied Article 6252-7 to Gilmore, El Centro's trustee-defendants claim that we must accept that statute's mandate at face value and hold that because the statute did not apply to Gilmore as written he lacks standing to seek an injunction against enforcement of the statute.

Not only does this argument lack merit, it is in-

apposite. Whether Article 6252-7 applies to Gilmore as written is of no concern to us. We look only to the effect of the action of state officers applying a state statute under 28 U.S.C.A. 2281. An allegation that the effect is violative of the Constitution confers jurisdiction upon a three-judge court.

We hold that for purposes of this action the trustees of El Centro are state officers within the meaning of 28 U.S.C.A. 2281. Defendant El Centro admits in its uncontradicted pleadings that it is governed by the terms of Article 2815k, Texas Revised Civil Statutes. Section 8(1) of that statute states in part, "[t]he Junior Colleges . . . described in the foregoing Sections 1 through 8 are declared to be public corporations of the State of Texas. . . ." The trustees and officers of such public corporations have been recognized, and we think properly so, as administrative officers of the State of Texas, *Wichita Falls Junior College District v. Battle,* 5 Cir., 1953, 204 F.2d 632, 633.

However, a certain ambiguity arises from the above admission. Article 2815k, upon careful reading, indicates that the junior colleges to which it applies are those created by existing independent school districts. The statute specifically directs that such colleges are to be governed by the ordaining school district but may be divested by the district into the control of 15 appointed regents. El Centro is not administered by an independent school district or 15 regents but by 7 trustees. Consistent with control of a junior college by 7 trustees are the provisions of Section 20 of Article 2815h, Texas Revised Civil Statutes. That statute, unlike 2815k, makes specific reference to county junior colleges and provides for

their creation and for determination of the trustees by popular vote of the residents of the county, the identical circumstance which gave rise to the creation of El Centro. That section further prescribes that the county junior college is to be designated a "body corporate," not a public corporation of the State of Texas.

Even assuming for purposes of argument that the trustees of El Centro are "county" officers, we are persuaded that under the facts of this case they must be held to answer as state officials. In determining the application of Section 2281 we "must have regard to both the nature of the legislative action which is assailed and to the function of the officer who is to be restrained. * * * Where a statute embodies a policy of statewide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the State and not simply in the interest of the locality he serves." *Spielman Motor Sales v. Dodge,* 1935, 295 U.S. 89, 94; 55 S.Ct. 678, 79 L.Ed. 1322, 1325. The statute here under attack, Article 6252-7, is an attempt to establish a statewide policy, not a policy peculiar to the Dallas County Junior College District. *Rorick v. Board of Commissioners of Everglades Drainage District,* 1939, 307 U.S. 208, 212, 83 L.Ed. 1242, 1244, 59 S.Ct. 808. Neither were the trustees in the enforcement of the statute performing a local function. *Wilentz v. Sovereign Camp, W.W.,* 1939, 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994; *Cleveland v. United States,* 1945, 323 U.S. 329. 65 S.Ct. 280, 89 L.Ed. 274. They were enforcing a policy of statewide concern, i.e., that no public office shall be held in the absence of the exe-

cution of a non-subversive loyalty oath by the prospective officeholder. They were but a county cog in a statewide wheel.

El Centro admits it applied Article 6252-7 to Gilmore but contends that such application was erroneous, thereby defeasing him of standing to directly attack the statute.

We are unable to accept this position. Gilmore was aggrieved by Article 6252-7 when it was applied to him by El Centro. Inquiry concerning whether or not El Centro was authorized to apply the statute is irrelevant. *Constantine v. Southwestern Louisiana Institute,* W. D. La. 1954, 120 F. Supp. 417. El Centro's action in exacting the oath is directly attributable to Article 6252-7. *Ex parte Bransford,* 1940, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249.

(2) Mootness

"A federal court is not empowered . . . to declare, for the government of future cases, principles of rules of law which cannot affect the result as to the thing in issue before it." *California v. San Pablo & T.R.R.,* 1893, 149 U.S. 308, 314, 37 L.Ed. 747, 749, 13 S.Ct. 876. As an individual, Gilmore's continued employment at El Centro was contingent upon students registering for tuba instruction in the ensuing semesters. He had no continuing status at the college such as tenure. Even assuming that the dismissal of Gilmore violated his constitutional civil rights—

> "[t]he sole function of an action for injunction is to forestall future violations. It is so unrelated to punishment or reparations for those past that its pendency or decision does not prevent concurrent or later remedy for past violations

by indictment or action for damages by those injured. All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions. Even where relief is mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue." *United States v. Oregon Medical Society,* 1952, 343 U.S. 326, 333, 96 L.Ed. 978, 984, 72 S.Ct. 690.

El Centrol, realizing that it erroneously applied the statute to Gilmore and the other instructors it had recruited in the fall of 1966, has discontinued exacting the oath from such instructors. Voluntary cessation of an alleged wrong does not, however, moot the controversy. *United States v. W. T. Grant Co.,* 1953, 345 U.S. 629, 97 L.Ed. 714, 73 S.Ct. 894; *Walling v. Helmerich & Payne,* 1944, 323 U.S. 37, 89 L.Ed. 29, 65 S.Ct. 11; *Keyishian v. Board of Regents,* 1967, 385 U.S. 589, 17 L.Ed. 2d 629, — S.Ct. —; *Gallagher v. Smiley,* D. Colo., 1967, —F. 2d —. Indeed, El Centro, by its own admission, will receive a considerable appropriation on September 1, 1967, from the Texas Legislature. Once in possession of state funds the college will be statutorily obligated to require the oath.

We do not, therefore, have a question of a contingent controversy. *Giles v. Harris,* 1903, 189 U.S. 475, 47 L.Ed. 909, 23 S.Ct. 639; *District of Columbia v. Brooke,* 1909, 214 U.S. 138, 52 L.Ed. 941, 29 S.Ct. 560; *Anniston Mfg. Co v.. Davis,* 1937, 301 U.S. 337, 81 L.Ed. 1143, 57 S.Ct. 817. The question is one of *when* the controversy will again arise. Gilmore is qualified and ready to instruct, his failure to sign the oath

being the only impediment to his so doing; El Centro continues to offer tuba classes to its students. In adhering to the classic pronouncement of Judge Learned Hand that "[t]o disarm the court [of power to enjoin] it must appear that there is no reasonable expectation that the wrong will be repeated." *United States v. Aluminum Co. of America,* 2 cir., 1945, 148 F. 2d 416, 448. We are compelled to retain this power and to hold that there is a reasonable expectation that the alleged wrong will be repeated. In *Lawrence v. Hancock,* S.D. W.Va., 1948, 76 F. Supp. 1004, the plaintiff, at the opening of the swimming season in 1946 and again in 1947, tried to gain admission to the public pool in Montgomery, West Virginia. On both occasions he was turned away. He filed suit in federal court seeking a declaratory judgment and an injunction prohibiting the pool officials from denying him the privilege of swimming in the pool. The defendant sought to defeat the claim by asserting that the controversy was moot because the lease under which the city had rented the pool facilities to those who had refused the plaintiff the enjoyment thereof had expired prior to commencement of the suit, and there was no indication that the city would again lease the pool or that its use would again be denied the plaintiff. The court granted the injunction stating "[t]he pool still exists, although temporarily closed. *If* it is opened to the public again, the plaintiff will be entitled to the rights he asserts." 76 F. Supp. at 1010. So it is with Gilmore. *If* a student registers for tuba instruction at El Centro, we think it a reasonable expectation that the oath will be again required of him. Defendant El Centro has offered the court no assurance that it will not be required. *United*

States v. W. T. Grant Co., supra. Gilmore is entitled to have his rights declared.

(3) Exhaustion of State Remedies

The doctrine that federal courts should abstain when plaintiffs have failed to exhaust their state remedies, *Alabama Public Service Commission v. Southern Railway Co.*, 1950, 341 U.S. 341, 95 L.Ed. 1002, 71 S.Ct. 762, has no application where the plaintiffs complain that they are being deprived of constitutional civil rights. *Lane v. Wilson*, 1939, 307 U.S. 268, 83 L.Ed. 1281, 59 S.Ct. 872; *Browder v. Gayle*, M.D. Ala., 1956, 142 F.Supp. 707.

Questions have been raised in this suit regarding Gilmore's right to represent a class. In *Hamer v. Campbell*, 5 Cir., 1966, 358 F.2d 215, a Negro citizen brought a class action on behalf of Negro voters who had been denied the right to register to vote. The court held that she had the right to represent such class. In the same case, class representation was denied to a plaintiff who sought to represent all potential Negro candidates for office because the plaintiff was qualified to run, since she had paid her poll tax, whereas she purported to represent potential Negro candidates who had not paid their poll taxes, and who were thereby denied eligibility. In denying class representation, Judge John R. Brown said,

> Also there was no showing that any other Negros intended to run for municipal office in Ruleville. Thus, there was no class of potential Negro candidates, and even if there were, Mrs. Hamer could not represent it since she could have been a candidate had she chosen to do so. Without a class on the one hand or a proper representative

on the other, a class action pursuant to rule 23 (a) must fail. It is elementary that "an individual suing in behalf of the members of a class must be a member of the class which he is supposed to represent." 358 F.2d, at 219.

In *Thaxton v. Vaughan,* 4 Cir., 1963, 321 F. 2d 474, we find these words:

> Thus, the plaintiffs do not include any member of the class of persons against whom de facto discrimination is alleged to be practiced in the home. The absence of any direct evidence in the record of the attitudes of the home inmates is indicative of the inadequacy of the plaintiffs to represent this relatively narrow category within the broad racial group to which they belong. The spurious class action permissible under rule 23 (a) (3) is a procedural device to avoid multipilicity of suits, but care must be taken that the plaintiffs fairly and adequately represent the group for which they purport to speak. 321 F. 2d, at 476.

These cases show the necessity for precise delineation of class representation. *Armstrong v. Board,* N.D. Ala., 1963, 220 F. Supp. 217; *Bailey v. Patterson,* 1962, 369 U.S. 31, 7 L.Ed. 2d 512, 82 S.Ct. 549. In *Gantt v. Clemson,* 4 Cir. 1963, 320 F. 2d 611, a Negro student sought enrollment in Clemson College and was refused. His case was accorded class representation in these words:

> Failure to rule that this was a class action and to grant appropriate injunctive relief was also error. . . . The action was brought by the plaintiff not only for his own benefit, but on behalf of other Negro citizens of South Carolina similarly situated. This procedure is entirely proper under Rule 23 (a) (3) of the Federal Rules of Civil Procedure. Other Negroes have in the past sought admission to Clemson, and doubtless there are other

qualified Negroes who will do so. These as well as Gantt are entitled to freedom from racially discriminatory policy. 320 F. 2d at 614.

It is our opinion that Gilmore is a proper representative of prospective teachers seeking employment by tax-supported institutions of learning in Texas.

(b) Mantle

Plaintiff Thomas John Mantle is a student at the University of Texas, who sought part-time employment at the University's law school library. His employment was confirmed by the head librarian and the morning he commenced work, Mantle was directed to the personnel office at the University of Texas for completion of routine forms attendant to employment. Included among the papers presented to Mantle by representatives of the University's Personnel Department was the loyalty oath prescribed by Article 6252-7, Texas Rev. Civ. Stat. Plaintiff read the oath and the list of organizations designated as subversive by the Attorney General under Executive Order No. 10450 and 1st, 2nd, 3rd and 4th supplements thereto, and discovered that he was a member of an organization included on the list, to-wit, The Industrial Workers of the World. Moreover, since he joined that organization knowing its aims and purposes,* and since his only de-

*Mantle's depositional testimony, in pertinent part, was as follows:

"Q. Now, you just said you were very interested in Socialism, and I thought you said you were—and believed in it politically, and I thought you said that in the context of why you became a member of the Industrial Workers of the World.

A. Yes.

Q. Well, are you telling me that they advocate Socialism?

A. Yes. . . . their particular brand of Socialism.

fense to membership under the oath would be a disclaimer of knowledge of the proscribed purposes of the organization, Mantle realized that he could not execute the oath and so advised the Personnel Office. He was "informed that he must execute the oath as a condition of his employment," and because of his refusal to do so, he was denied employment at the University of Texas. Since we are here according to Gilmore representation of prospective teachers in the interest of clear delineation of class representation, see *Hamer v. Campbell,* supra; *Thaxton v. Vaughan,* supra, we accord to Mantle representation of prospective employees of the State of Texas.

In this context, Mantle's standing to sue is unassailable. His employment at the law library having

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Q. What is their particular brand of Socialism?
A. Labor syndicalism.
Q. What is labor syndicalism?
A. It is a particular belief that . . . I believe that basically it is that all of the working people in the world, if they were to unite in one union, then this union would be the—become the dominant—I would say dominant force in society.
Q. In other words, it could overthrow all other governments, supplant all existing government authority? Just say 'Yes' or 'No'.
A. Yes.
Q. Does this organization believe in it? You have just said you believed in this—what was it? What was the term—'syndicalism'?
A. Yes.
Q. (By Mr. Shultz) At the time you joined the Industrial Workers of the World, did you know that this organization was on the list of subversive organizations compiled by the United States Attorney General?
A. Yes.
Q. You did?
A. Yes.
Q. You purposely joined it, knowing that?
A. I joined it knowing that, yes."

been confirmed, the conclusion is inescapable that he was well qualified for the position he sought. He was denied employment solely because his membership in the aforesaid organization made impossible the execution of the oath, a necessary incident of continued employment, thereby denying him employment otherwise available to him. That his salary would be paid in part by state funds is not in dispute. Plaintiff Mantle, therefore, has standing to bring this suit individually and as a representative of the class herein defined.

(c) Palter and Pullen

A Federal court will not pass upon the validity of a state statute on complaint of those who fail to show injury by its enforcement. *Tyler v. The Judges*, 1900, 179 U.S. 405, 45 L.Ed. 252, 21 S.Ct. 206; *Hendrick v. Maryland*, 1915, 235 U.S. 610, 59 L.Ed. 385, 35 S.Ct. 140; *Fairchild v. Hughes*, 1922, 258 U.S. 126, 66 L.Ed. 499, 42 S.Ct. 274; *Massachusetts v. Mellon*, 1923, 262 U.S. 447, 67 L.Ed. 1078, 43 S.Ct. 597.

While plaintiffs Palter and Pullen were required to execute the oath upon being employed by the University of Texas in 1964, and 1965, respectively, it does not appear that their compliance was other than free and willing. Furthermore, it has not been shown that they will ever again be required to execute it. Article 6252-7 appears to require only one execution, and plaintiffs have failed to uncover the slightest threat of its being required of them again during their entire tenure.

Nevertheless, plaintiffs urge that the enforcement of Article 6252-7 requires them "... to conform to a standard of conduct which is not susceptible of accu-

rate determination" and that they may not repudiate the oath. Again, however, plaintiffs' fears are entirely unjustified. The oath binds the maker to nothing but the existence of present and past facts. It does not bind him to avoid future associations or abstain from future conduct of any kind. We consider it to impose no prospective restraints of any character on plaintiffs' conduct.

In short, these two plaintiffs have failed to show that they have been injured by an enforcement of Article 6252-7. There must be some probability of invaded rights before injunctive muscles are flexed. The "ifs" of future statutory construction and its then application are too speculative and unpredictable to summon injunctive powers. *Congress of Racial Equality v. Douglas,* 5th Cir. 1963, 318 F. 2d 101. In contradistinction, an injunction was sanctioned in *Baggett v. Bullitt,* supra, where the President of the University of Washington and its Board of Regents had given notice that all teaching personnel would be required to subscribe to the oath on pain of dismissal. However, we hold that on the evidence presented to this court Plaintiffs Palter and Pullen have wholly failed to establish the necessary standing to attack the constitutionality of Article 6252-7. Since they have no present cause of action, they cannot qualify as representatives of any class.

(d) Kahn

We granted plaintiff Kahn's motion to intervene because his claim presented questions of law and fact in common with the other plaintiffs in this cause. Federal Rules of Civil Procedure, Rule 24, U.S.C.A. The intervention of Kahn, if not compelled, is at least jus-

tifiably permissive under the liberalized aegis of Rule 28. *Atlantic Development Corp. Ltd. v. United States,* 5th Cir. slip opinion, June 12, 1967, No. 22,958.

His standing as a plaintiff in this suit cannot be seriously challenged. Upon the evidence it is clear that he was tendered a *bona fide* offer of employment as a professor of psychology by the University of Texas Board of Regents which he intends to accept, provided that his execution of the loyalty oath required by Article 6252-7 is not made a condition of his employment. The Board of Regents concede that Kahn's employment is to be conditioned upon his signing the loyalty oath.

Obviously, the enforcement of Article 6252-7 by the State of Texas is effectively denying plaintiff Kahn the employment he otherwise would have. His injury is sufficient to provide standing to assert the unconstitutionality of that statute in this court.

Plaintiff Kahn would bring this action individually and as a representative of a class of professors, teachers, and other employees of state-supported educational institutions. However, we have concluded that, like Gilmore, he may properly represent only prospective professors and teachers seeking employment in educational institutions supported by the State of Texas. See *Hamer v. Campbell,* supra, and *Thaxton v. Vaughan,* supra.

(e) Cunningham

We need not decide Cunningham's standing as a plaintiff in this cause at the time suit was instigated. Evidence submitted on unchallenged affidavit subsequent to oral argument shows that he is not now and

at no time after the conclusion of the first six weeks of the 1967 Summer Session was an enrolled student at the University of Texas. Furthermore, it is not contended that he contemplates future enrollment in state-supported schools in Texas.

Consequently, we hold that upon the evidence the enforcement of Article 2809b threatens no injury to him. He does not possess the standing necessary to entitle him to assert the unconstitutionality of that statute. *U. S. v. Oregon Medical Society,* supra; *Hamer v. Campbell,* supra.

VENUE and JOINDER

As discussed supra, the claim alleged by plaintiff Gilmore against the defendant El Centro is, for venue purposes, properly before the Court. There is, therefore, proper venue in the Northern District of Texas as to the Board of Regents of the University of Texas, the State Treasurer, and the Comptroller if these parties have properly joined as defendants. 18 U.S.C.A. § 1392 (a).[20]

Rule 20, Fed. Rules Civil Procedure, permits joinder of plaintiffs or defendants whenever there is a common question of law or fact and the claims involved

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[20] 18 U.S.C.A. § 1392 (a) provides:
"Any civil action, not of a local nature, against defendants residing in different districts in the same state, may be brought in any of such districts."

Commenting on § 1392 (a), Professor Moore observed:

"As an exception to the general venue statute, it was Congress' intent that § 1392 (a) preserve statewide venue in actions where multiple defendants reside in the same state, but in different districts."
1 Moore's Federal Practice § 0.143 (1965).

arise out of a single transaction, occurrence, or series of transactions or occurrences."[11]

Since joinder of parties is dependent on the concepts of "common question of law or fact" *and* "same transaction," these tests must both be met in order for us to hold, as we do, that there is proper joinder of defendants in the case at bar. *Music Merchants v. Capitol Records,* E.D.N.Y. 1957, 20 F.R.D. 462; *Philadelphia Dressed Beef Co. v. Wilson and Co.,* E.D. Pa. 1956, 19 F.R.D. 198. The exaction of the Article 6252-7 oath from each of the respective plaintiffs presents a question of law common to all. *Eastern Fireproofing Co., Inc. v. United States Gypsum Co.,* D. Mass. 1958, 160 F. Supp. 580, 581.

In *United States v. Mississippi,* 1965, 380 U.S. 128, 13 L.Ed 2d 717, 85 S.Ct. 808, the suit was against the State of Mississippi, its state election commissioners and six county voter registrars, alleging the hampering of the voting rights of Negro citizens of the state. In apposition to our case, Justice Black, speaking for the Supreme Court, said:

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[11]"Rule 20. Permissive Joinder of Parties.

Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

> The District Court said that the Complaint improperly attempted to hold the six county registrars, jointly liable for what amounted to nothing more than individual torts committed by them separately with reference to separate applicants. For this reason, it would apparently have held the venue improper as to the three registrars who live outside the Southern District of Mississippi, and a fourth who lived in a different division of the Southern District, and it would have ordered that each of the other two registrars be sued alone. But the complaint charged that the registrars had acted and were continuing to act as part of a statewide system designed to enforce the registration laws in a way that would inevitably deprive colored people of their right to vote solely because of their color. On such an allegation the joinder of all the registrars as defendants in a single suit is authorized by Rule 20 (a) of the Federal Rules of Civil Procedure. . . . These registrars were alleged to be carrying on activities which were part of a series of transactions or occurrences, the validity of which is dependent to a large extent upon 'questions of law or fact common to all of them.' Since joinder of the registrars in one suit was proper, the argument that venue as to some of them was not properly laid is also without merit, 28 U.S.C.A., Sections 1392 (a), 1393 (b), 1958, ed). 382 U.S. at 142, 13 L.Ed. 2d at 726.

In the case at bar, the series of occurrences from which whatever right to relief there may be arises is the statewide policy of conditioning state employment upon the exaction of the loyalty oath detailed in Article 6252-7. Both tests having been met, we hold that joinder of defendants is permissible under Rule 20, Federal Rules of Civil Proc. and, therefore, that venue

is properly laid in the Northern District of Texas."[12]

The exaction of formalized fealty is a diminishing phenomena in our girding against real and substantial subversion. This case, however, presents a confrontation of the putative protection of such oaths with our cherished First Amendment freedoms. While there can be no compromise with subversion, concomitantly, there can be no fettering of the exploration in the realm of ideas. Exposure of the false and the affirmation of truth are both ceded in the free range of association and expression. These are among the self-evident truths that history and experience have not palled. Suppression will not kill nefarious ideas, only exposure will. Our nation can survive occasional falsehood. Its permanence and vibrancy as a democracy demand that freedom which perchance permits the false to live for a day. Attempted suppression sometimes fortifies the false with undeserved dignity. Silence is often more contemptuous of its falsity.

Plaintiffs have challenged the constitutionality of Section 1 of Article 6252-7 (V.A.C.S., Tex.) on grounds (1) that its enforcement denies them the freedom of association guaranteed by the Fourteenth Amendment against state curtailment and (2) that it is unconstitutionally vague and uncertain.

Section 1, in effect, provides that no state funds may be paid to any person as wages who has not executed an oath attesting (1) that he is not and never has been a member of the Communist Party; (2) that he is not and during the past five years has not been a member of an organization listed by the Attorney General

[12]At oral argument, defendants waived their motion to sever and transfer under 28 U.S.C.A. § 1404 (a).

of the United States pursuant to Executive Order No. 10450, December 9, 1953, and First, Second, Third and Fourth Supplements thereto, or if he was a member during such period, he may explain that he did not have knowledge of the proscribed purposes of the organization at the time he joined or during the period he was a member; and (3) that he is not, and during the past five years has not been, a member of any organization registered under the Federal Internal Security Act of 1950 or, if he was a member during such period, that he did not have knowledge of the proscribed purposes of the organization at the time he joined or during the period he was a member.

It is at once evident that an individual seeking employment with the State of Texas must be summarily rejected if he refuses to take the prescribed oath. It is equally apparent that an applicant who has ever been a member of the Communist Party or who has during the past five years been a member of a designated organization with knowledge of the unlawful purposes of the organization, must refuse to take the oath in order to avoid prosecution for perjury. The inevitable result of this statutory scheme is that all otherwise qualified persons who are or have been members of the Communist Party and/or other designated organizations with knowledge of their unlawful purposes are ineligible for state employment solely because of such membership.

The question we are called upon to decide is whether disqualification from state employment solely on grounds of present or past membership in such organizations is compatible with First Amendment liberties guaranteed against state infringement by the Fourteenth Amendment.

We start with the premise that a state cannot condition an individual's privilege of public employment on his non-participation in conduct which, under the Constitution, is protected from direct interference by the state. In *Sherbert v. Verner,* 1963, 374 U.S. 398, 404, 10 L.Ed. 2d 965, 971, 83 S.Ct. 1790, the Supreme Court pointed out that "[i]t is too late in the day to doubt that liberties of religion and expression may be infringed by a denial of or placing of conditions on a benefit or privilege." And in *Keyishian v. Board of Regents,* 1967, 385 U.S. 589, 17 L.Ed. 2d 629, — S.Ct. —, noted 21 Southwestern Law Journal, No. 3 (1967), the Court denounced the assumption of *Adler v. Board of Education,* 1953, 342 U.S. 485, 96 L.Ed. 517, 72 S.Ct. 380, that the employment of teachers could be conditioned on their giving up constitutional rights which could not be directly curtailed. If membership in the organization designated by Section 1 of Article 6252-7 constitutes activity which the state may not directly attaint, then it must follow that the state of Texas has no right to condition employment on non-membership. We proceed to a determination whether such membership is constitutionally protected actively.

The First Amendment embodies a revered freedom of asociation which is no more subject to state curtailment than any other First Amendment right. The Supreme Court has repeatedly defended the individual's freedom to engage in associations of his choice for the advancement of his own beliefs and ideas. See *National Association for Advancement of Colored People v. State of Alabama, ex. rel. Patterson.* 1958, 357 U.S. 449, 2 L.Ed. 2d 1488, 78 S.Ct. 1163; *National Association for Advancement of Colored People v. State of Alabama ex. rel. Flowers,* 1964, 377 U.S. 288, 12

L.Ed. 2d 325, 84 S.Ct. 1302; *Elfbrandt v. Russell,* 1966, 384 U.S. 11, 16 L.Ed. 2d 321, 86 S.Ct. 1238; *Keyishian v. Board of Regents,* supra. That freedom is never more wisely invoked than in cases where the free exchange of thoughts and ideas among members of the academic community is threatened. *Shelton v. Tucker,* 1960, 364 U.S. 479, 5 L.Ed. 2d 231, 81 S.Ct. 247; *Sweezy v. New Hampshire,* 1957, 354 U.S. 234, 1 L.Ed. 2d 1311, 77 S.Ct. 1203.

Of course, the First Amendment rights are not absolute. But it is only when the exercise of such rights threatens a clear and present danger to some substantial state interest that the state is justified in curtailing them. Defendants contend that the state has a vital interest in protecting itself from internal weakening by keeping subversives out of the government. We agree. However, it is another question whether the procedures devised by the state of Texas for protecting that interest can withstand constitutional attack.

We believe the Supreme Court has made it absolutely clear that the mere membership of an individual, knowing or otherwise, in any of the organizations designated by Article 6252-7 does not constitute him a sufficient threat to state or national security to warrant arbitrary exclusion from state employment.

In *Elfbrandt v. Russell,* supra, the Court struck down a statutorily required oath which bound state employees not to become knowing members of designated "subversive" organizations. Employees who became members, without more, were subjected to prosecution for perjury and automatic dismissal. Justice Douglas, speaking for the majority, said:

> Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the "specific intent" to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization. 384 U.S. at 17, 16 L.Ed. 2d at 325.

We believe that *Elfbrandt* states the principle which controls our decision: "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." 384 U.S. at 19, 16 L.Ed. 2d at 326.

Oaths in support of the government are not abhorrent to the Constitution. Indeed, the Constitution provides one." The vice of the oath condemned here is that it equates membership or association with nonallegiance. A statute which automatically disqualifies applicants on the basis of membership alone ensnares the innocent with the guilty. While such membership may furnish a basis for further inquiry into an applicant's present or past activities, it does not in itself constitute a threat to the state. An individual is entitled to be judged by his own conduct, not that of his

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"U.S. Const. Art. II, Sec. 1

Cf. *Gerende v. Baltimore City Board of Supervisors of Elections*, 1951, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745, wherein the Supreme Court upheld a Maryland state loyalty oath as constitutionally permissible. Relying on *Gerende*, a 3-judge court in Maryland upheld a similar oath (modified to conform to *Elfbrandt*) in *Whitehill v. Elkins*, D.Md., 1966, 258 F.Supp. 589, prob. juris. noted, 1967, 386 U.S. 906.

associates. To the extent that Article 6252-7 disqualifies passive or dissenting members of such organizations, it is too broadly drawn. Even as to ignorant members, the statutory exculpation,[14] if any, is vague in its implementation. See *Speiser v. Randall*, 1958, 357 U.S. 513, 78 S. Ct. 1332, 2 L.Ed. 2d 1460, with contemporary elucidation by *Keyishian v. Board of Regents*, supra.

By the terms of the Arizona statute construed in *Elfbrandt* the result of becoming a member of a proscribed organization was criminal punishment, whereas the only consequence of membership under Article 6252-7 is disqualification. But any doubts this court might have had concerning the applicability of the quoted portions of the *Elfbrandt* opinion to the case at bar are completely dispelled by the recently decided case of *Keyishian v. Board of Regents*, supra.

In *Keyishian*, faculty members of the State University of New York challenged the constitutionality

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[14]Art. 6252-7:

. . .

2. . . . or, in the event that the affiant has during such five year period been a member of any such organization, association, movement, group or combination, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state that, at the time when he joined and throughout the period during which he was a member, he did not know that its purposes were the purposes which the Attorney General of the United States has designated; and

3. . . . or, in the event that the affiant has during such five year period been a member of any such organization, he shall state its name, shall state in detail the circumstances which led him to join it, and shall state, that, at the time when he joined it and throughout the period during which he was a member, he did not know that its purpose was to further the goals of the Communist Party or that it was controlled by the Communist party.

of certain sections of the New York Education Law and New York Civil Service Law on the same grounds upon which these plaintiffs here launch their attack on Article 6252-7. Section 105 (1) (c) of the Civil Service Law and Section 3022 (2) of the Education Law made membership in proscribed organizations to be designated by the Board of Regents and/or membership in the Communist Party prima facie evidence of disqualification for appointment or retention of any position in New York public schools.

The New York statutory scheme did not require the execution of an oath, and no penalties other than disqualification resulted from membership in the designated organization. Nevertheless, the Court adopted the rationale and language of *Elfbrandt* without hesitation. Accordingly, the fact that by the terms of Article 6252-7 membership results only in disqualification does not render *Elfbrandt* any the less controlling here; it merely emphasizes the applicability of *Keyishian*.

It may be observed that the Texas statute operates only to deny initial employment because of present or past associations, whereas the New York scheme operated to disqualify employees for proscribed associations at any time during their tenure. Article 6252-7 appears to require no sanctions for membership which is undertaken following the execution of the prescribed oath at the beginning of the employment relationship. However, we do not consider this distinguishment to affect our decision. There can be little difference in principle between discharging one because of his constitutionally protected associations and refusing to

hire him for the same reasons. The result is an unconstitutional deprivation in either case.

We find that Section 1 of Article 6252-7 suffers from the same "impermissible overbreath" which afflicted the statutory provisions struck down in *Elfbrandt* and *Keyishian*. While the statute may operate to denigrate associations not under the protective umbrella of the Constitution, it also condemns associations which are. For that reason it cannot stand.

Our finding that Section 1 of Article 6252-7 is constitutionally infirm pretermits a discussion of whether it is unconstitutionally vague and uncertain.

Counsel for the plaintiffs shall submit, on notice to the defendants, an appropriate order.

ENTERED this 30th day of August, 1967.

IRVING L. GOLDBERG,
Circuit Judge.

W. M. TAYLOR, JR.
District Judge.